

In the Provincial Court of Alberta

Citation: Idzan v. Broadfoot, 2011 ABPC 208

Date: 20110629
Docket: P0990305565
Registry: Edmonton

Between:

David Idzan and Tanya Idzan

Plaintiffs

- and -

Jack Broadfoot and DynaTeam Realty Ltd.

Defendants

Reasons for Judgment of the Honourable Judge J.L. Skitsko

[1] This action was brought against a realtor, Jack Broadfoot, seeking damages in Mr. Broadfoot's failure to provide adequate service and advice in the execution of a Guaranteed Sale Agreement ("GSA") and sale of property owned by the Plaintiffs. Later, the claim was amended to add as Defendant, Dynateam Realty Ltd., the company for which Mr. Broadfoot worked ("the real estate company"), and Fountainhead Financial Ltd. ("Fountainhead"), the company that failed to complete the alleged guaranteed sales transaction. On October 29, 2010, the Plaintiffs withdrew their claim against Fountainhead.

[2] Before the trial commenced, the Court had made it clear to the parties that this Judge had pre-trialed this matter on April 23rd, 2010 and that normally a Judge who conducts a pre-trial conference "... shall not except where all the parties to the action give their consent for the Judge to do so, conduct the trial of the action" (see section 64(4) of *The Provincial Court Act*, c. P-31 RSA 2000). The parties in this case did so consent at the outset of the trial.

[3] The issue in this case is whether the Defendant, Jack Broadfoot, the realtor, was guilty of negligence in the preparation of documentation relating to the GSA of the Plaintiff's condominium located on 118 Street in Edmonton, Alberta, which according to the Plaintiffs delayed the sale of their property.

[4] Tanya Idzan and her husband David owned the condominium for some time prior to 2007 when they were looking ahead to build a new home and take possession of their new home which was expected to be in the first 6 months of 2008.

[5] Mr. and Mrs. Idzan decided to build this new home with a proposed possession date of approximately 1 year from the date of entering into the agreement with the builder. This necessarily meant that they would be required to sell their condominium first, failing which they would literally not be able to afford the new home. I am satisfied it was not financially feasible for the Plaintiffs to keep both properties.

[6] In mid-March of 2007, the Plaintiffs met with the Defendant realtor, who took an exclusive listing agreement of their condominium. It would be offered for sale at the price of \$254,900.00. It was not to be put on the market in 2007 as the Plaintiffs needed a residence until their new home was ready. The listing contract was dated March 10th, 2007, and duly signed by Mr. and Mrs. Idzan.

[7] Concurrent with the signing of the Real Estate Listing Agreement, the evidence revealed that Mr. Broadfoot presented the Plaintiffs with what was referred to as a "Guaranteed Sales Agreement" (the "GSA") of their existing property. The proposed purchaser under this GSA was Fountainhead Financial Inc.. Under this GSA, the terms allowed the Defendants, Dynateam Realty Ltd., and Mr. Broadfoot to list the property for sale and market it at a price of \$254,900.00 within the first 21 days of the listing, and \$252,500.00 within the second 21 days of the listing.

[8] The remaining relevant provisions of the GSA read as follows:

“7. Owner shall furnish Fountainhead with a registerable Transfer of Land free of all charges, liens or encumbrances save those agreed upon by Fountainhead in writing, together with a current Real Property Report and a Compliance Certificate. In the event the said property is registered as a condominium, then the owner shall supply Fountainhead an up-to-date Estoppel Certificate (with no balance owing) together with the latest annual general meeting report, the most recent Financial Statement, an insurance certificate, and copy of the files bylaws. If the condominium is base land, a current Real Property Report and Compliance Certificate are required. The parties instruct their solicitors to follow normal Conveyancing practice. The Owner shall cause his solicitor to furnish all documents contemplated herein within a reasonable time such to allow the other solicitor time to effect registration.

8. The Owners will be responsible for any cost and / or penalties charged by the mortgage company to discharge the

existing mortgage. The decision to assume or payout an existing mortgage will be made solely by Fountainhead.

9. The Owner will be responsible for all normal legal fees and costs incurred with the sale of the home to Fountainhead or another buyer.

10. There shall be no encumbrances, liens, or charges, against the property, other than a first mortgage, that affects the marketability of the property. Fountainhead may elect not to purchase the Property and this Agreement shall, at Fountainhead's sole discretion, be terminated if the title can not be provided as contemplated herein."

[9] The GSA would see Fountainhead agree to purchase the property in the event that the property was not sold before May 31st, 2008, at a price of \$225,000.00. This price I am satisfied on the evidence was a "net" price to the Plaintiffs. Real estate commissions would be included in this price under the GSA

[10] As the home being built for the Idzan's was nearing completion in the spring of 2008, real estate values in the City of Edmonton had been falling. There is no doubt that the value of Edmonton real estate by the late months of 2007 and the early months of 2008 was dropping rapidly. By April 23rd, 2009, when it was clear that Mr. and Mrs. Idzan's newly constructed home would be ready for occupancy within a short period of time, their condominium property was listed for sale by the realtor for the sum of \$244,900.00. It was suggested to the Plaintiffs by Mr. Broadfoot that the asking price of the Idzan's condominium be reduced to \$234,900.00. However, it was clear to the Plaintiffs that at this price they would net less funds than if they were able to sell their property under the GSA of March 10th, 2007. With this GSA in place, the Plaintiffs felt that they could close the purchase of their new home for \$225,000.00 net. The Plaintiffs however, needed to extend the closing date of the transaction with Fountainhead to July 15th to ensure a smooth move to their new home. Mr. Broadfoot met with the principal of Fountainhead, Mr. Shane Parker, and secured such an amendment on or about April 23rd, 2008. This was the only part of the March, 2007, GSA to be amended.

[11] On June 20th, 2009, the Plaintiffs took possession of their new home and instructed their lawyer to prepare the closing documents on their condominium under the GSA and forward the same to Fountainhead.

[12] On July 14th, 2009, all closing documentation but for certain condominium documents was delivered to the offices of Parker Dubrule, solicitors for Fountainhead. On July 17th, 2009, Mr. Dubrule, solicitor for Fountainhead, returned the documentation and rejected the closing of this transaction. The reasons for failure to close the transaction were summarized as follows:

1. Failing to provide transfer documents in a reasonable period of time (see paragraph 7 of the Guaranteed Sales Agreement);
2. Failing to provide for or allowing the assumption of the mortgage charge (see paragraphs 2 and 8 of the Guaranteed Sales Agreement);
3. Failing to provide the condominium documents as required (see paragraph 7 of the Guaranteed Sales Agreement).

[13] Of the three reasons above, I am satisfied that only (2) proved to be a legitimate or sufficient reason for the failure to close.

[14] As a result of Fountainhead's failure to close this transaction, the Plaintiffs were required to maintain and keep in good order the condominium property which they were not able to sell until November of 2008. The property was reduced for the purposes of a quicker sale and sold at the price of \$185,000.00.

[15] The Plaintiffs are claiming damages on the loss of the sale of the property together with those expenses in maintaining the property, including costs of utilities, condominium fees, additional insurance expenses, property taxes and mortgage and other interest expenses. I am satisfied these amounts exceed \$25,000.00 and indeed at trial all parties agreed that this was the case. The only question in this case is whether the realtor and real estate company are liable to the Plaintiffs for such loss.

The Plaintiffs' Arguments

[16] The Plaintiffs presented evidence that they claim was evidence of negligence on the part of their realtor, the Defendant, Mr. Broadfoot during the preparation of the Exclusive Listing Agreement and the GSA. During the preparation and signing of the Exclusive Residential Real Estate Listing Contract, the Plaintiffs stated that they had made it very clear that upon the sale of their condominium property the mortgage in place could not be assumed. In Section 9 of the Exclusive Residential Real Estate Listing Contract, the following was noted:

“9.3 If the property is encumbered by a mortgage than: is the mortgage high ratio insured? Yes

Subject to any required lender approval, will you allow the assumption of any existing mortgage or mortgages? No”

[17] From the Plaintiffs' perspective, they argued that this was an obvious inconsistency in the Guaranteed Sales Agreement as the GSA made it clear in paragraph 2 as follows:

“2. Fountainhead hereby agrees in the event the said property is not sold on or before the 15th of July, 2008, to purchase the property for the sum of \$225,000.00, payable by the way of

assumption of the first mortgage and the balance by way of cash. Alternatively, Fountainhead may purchase by way of a new mortgage and the balance by way of cash”.

[18] Given that the proposed purchaser, Fountainhead, in their solicitor’s letter of July 17th, 2009, referenced its inability to assume the existing mortgage, the Plaintiffs were of the view that this was a glaring error on the part of the realtor acting on their behalf which made the closing with Fountainhead unlikely, if not impossible, given the state of real estate values at the time.

[19] Even when the GSA signed in March of 2007 was amended on April 23rd, 2008, this mortgage assumption requirement was not rectified by the realtor. I am satisfied that the realtor did not address his mind as to the state of this contradiction and did not bring this to the Plaintiffs attention.

[20] The Plaintiffs further suggested that the Defendant’s conduct in not insisting that they get independent legal advice prior to the execution of the GSA, amounted to negligence on the part of the realtor for which the realtor is liable and for which the real estate company is vicariously liable.

The Position of the Defendant, Jack Broadfoot

[21] Mr. Broadfoot testified that he has been a broker and manager with the corporate Defendant, Dynateam Realty for more than 12 years.

[22] He confirmed that when the Plaintiffs were referred to him, they both advised him that a “guaranteed sale” on their condominium was necessary as they were planning to build a new home and planning to take possession of that home within the following year. Mr. Broadfoot stated that he met with the Plaintiffs and explained to them the nature of the GSA. He recalled advising the Plaintiffs that Fountainhead was a locally owned company and that he had admitted to knowing the principal of the company and doing business with him on prior occasions. He advised that no questions or concerns were raised by the Plaintiffs during their execution of the GSA in March of 2007. The Defendant advised the Court that while no formal listing and marketing of the Plaintiffs’ condominium property for sale took place until April 23rd, 2008, an Exclusive Listing Agreement had been in place since March 10th, 2007. He was simply awaiting instructions from the Plaintiffs when to place the property on the sales market.

[23] The Defendant told the Court that when the property was listed formally, it was put on a multiple listing service. However, by April, 2008, as previously noted, the Edmonton real estate market was experiencing a marked slow down and decline in values. He further confirmed in his evidence that under the GSA, should the Plaintiffs sell their condo under the same, there would be no commissions payable to Mr. Broadfoot which necessarily meant a \$225,000.00 net price to the Plaintiffs.

[24] In April of 2008, a new extension of the GSA closing date to July 15th, 2008, had to be obtained by Mr. Broadfoot from the principal of Fountainhead Financial, Mr. Shane Parker. Mr. Parker agreed to this and the GSA was initialed by all parties. I am satisfied that the GSA remained the same in all respects but for the extension of the closing date to July 15th, 2008.

[25] Given the provisions in the Exclusive Listing Agreement regarding the non assumption of mortgage provisions and the particulars of clauses 7, 8 and 10 of the GSA, an obvious anomaly in the agreement existed. On the one hand, the Exclusive Residential Real Estate Listing Contract made it very clear that if the property was encumbered by a mortgage, which it clearly was, the sellers of the property (the Plaintiffs) would not allow the assumption of the existing mortgage. On the other hand, quoting from the GSA; “. . . the decision to assume or payout (the) existing mortgage (would) be made solely by Fountainhead”. Further, as in paragraph 10, Fountainhead could even elect not to purchase the property. The question that needs to be asked was whether this was a guaranteed sale at all?

[26] It is clear from the evidence and it is my finding of fact that these anomalies were not explained by Mr. Broadfoot during his meetings with the Plaintiffs.

[27] I came to this conclusion in what proved to be a significant part of the evidence given by Mr. Broadfoot under cross-examination. Mr. Broadfoot was asked if he had given the Plaintiffs an opportunity to obtain independent legal advice in advance of the signing of the Guaranteed Sales Agreement. He told the Court he “didn’t recall”. It seems to me that the recommendation to obtain independent legal advice, if made, would carry with it significant particulars that would or should make a reasonably informed realtor recall such advice. The realtor might be called upon in these circumstances to refer the Plaintiffs to a lawyer or a list of lawyers or advise the Plaintiffs to speak to their own lawyer. The lack of detail on the part of Mr. Broadfoot coupled with a rather vague answer to this question leads me to the conclusion that no such recommendation for independent legal advice was made by Mr. Broadfoot.

[28] When taken in totality, the Plaintiffs argued that these failures and oversights amounted to negligence. For this finding to take place, an analysis of the law is required.

Analysis

[29] The Plaintiffs allege that the defendant realtor was negligent in the performance of his duties as their real-estate agent. In order to satisfy to the court that Mr. Broadfoot was in fact negligent in his conduct throughout the sale of the plaintiff’s apartment condo it must be shown that:

- (a) a duty of care was owed to the by the defendant to the plaintiffs;
- (b) there was a breach of that duty of care either through knowingly failing to meet the required standard of care or failing to meet the standard of a reasonable person in the same circumstances;
- (c) the negligent conduct factually caused the plaintiff’s loss;
- (d) the loss suffered was reasonably foreseeable; and

- (e) a loss was in fact suffered by the plaintiffs.

Duty of Care

[30] There is no dispute that Mr. Broadfoot was the real-estate agent for the plaintiffs. As an agent, Mr. Broadfoot placed himself in a special fiduciary relationship with his clients whereby he had a duty to conduct himself in a certain manner being mindful of the trust placed in him, and the vulnerable position the plaintiffs found themselves in when signing an exclusive sales agreement with him. He also stood in the position of owing his clients a duty of care through the contractual relations the Plaintiffs had agreed upon.

Standard of Care

The General Requirement of Expert Evidence

[31] It is generally accepted that the Standard of Care expected of an agent is to act with reasonable care and skill in performing his or her duties. Epstein J.A. in *Krawchuk v. Scherbak*, 2011 ONCA 352, O.J. No. 2064 made some general observations regarding the assessment of the Standard of Care in real-estate agency situations.

To avoid liability in negligence, a real estate agent must exercise the standard of care that would be expected of a reasonable and prudent agent in the same circumstances. This general standard, a question of law, will not vary between cases and there is no need for it to be established through the use of expert evidence...The translation of that standard into a particular set of obligations owed by a defendant in a given case, however, is a question of fact. External indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standard, may inform the standard. Where a debate arises as to how a reasonable agent would have conducted himself or herself, recourse should generally be made to expert evidence.

[32] Martin J. in *Adeshina v. Litwiniuk & C.*, 2010 ABQB 80, A.J. No. 125 reiterated this point stating that it is generally inappropriate for a trial judge to determine the standard of care in a professional negligence case where expert evidence has not been tabled by the plaintiff. The reason for this being that in cases of professional negligence, given the specialized expertise and knowledge of the individuals involved, it is often difficult for an outsider to have sufficient knowledge to decide what the reasonable practitioner in that field would do in the given circumstances. Thus in order to satisfy the necessary burden of proof a plaintiff has in a civil action, they will quite often have to tender evidence as to what standard the court should be grading the defendants conduct against (see also: *Haag v. Marshall*, [1989] B.C.J. No. 1576, 61 D.L.R. (4th) 371 (BCCA)).

The Exception to the Rule

[33] It is clear that there will still be situations in which expert evidence will not be required to prove a realtor's failure to meet the standard of care, as deemed by the trial judge in those particular circumstances. There will be cases in which the defendant's conduct has so clearly

fallen below the standard required of him or her that expert evidence is not required. In particular, the BC Court of Appeal in *Zink v. Adrian*, 2005 BCCA 93, B.C.J. No. 295 noted two situations in which there is an exception to the general rule requiring expert evidence to be tendered.

- a. Where the court is faced with a nontechnical matter that of which an ordinary person would be expected to have knowledge.
- b. Where the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing the precise parameters of that standard.

[34] The leading case in Alberta regarding the necessity for expert evidence is *Kelly v. Lundgard*, 2001 ABCA 185. There the majority of the Alberta Court of Appeal ruled that it is not always necessary to call expert evidence in every medical malpractice case. It should be provided where the negligence involves a technical issue on which the court needs guidance from experts.

[35] In *ter Neuzen v. Korn*, [1995] S.C.J. No. 79, the Supreme Court of Canada dealt extensively with the issue of expert evidence in the context of medical treatment cases. It held that even in treatment cases, expert evidence is not always necessary. Expert evidence is only called on as an aid to guide the Court in reaching a sound decision. Expert evidence regarding approved practice is not necessarily conclusive, especially where the conduct is not of a technical manner but rather relating to the ordinary taking of precautions.

[36] Applying the aforementioned line of reasoning to the case at hand, it can be seen that the lack of expert testimony pertaining to the conduct of Mr. Broadfoot as agent to the plaintiffs is not fatal to their case. There are a number of sources available to guide the court in uncovering what the appropriate standard of care should be. In this case, the plaintiffs argued that their agent had a duty to practice the reasonable skill and care of a real-estate agent in conducting business on their behalf, and that he failed to do so.

[37] Specifically it needs to be decided whether Mr. Broadfoot failed to meet the reasonable standard of care of a real-estate agent in failing to notice the anomalies in the contractual provisions and to explain them to his clients. Likewise, it must be decided whether it is reasonable to expect a real-estate agent to give his or her clients an opportunity to obtain independent legal advice in advance of signing a Guaranteed Sales Agreement.

The Law – A Real Estate Agents Standard of Care

[38] The Court in *Paul S. Starr & Co. Ltd. v. Watson et al.*, [1973] 1 O.R. 148-150 (ONCA) *Paul* made some poignant remarks:

“Regarding an agent who drafted an ambiguous clause contrary to the listing instructions given to the agent ... (h)e had a duty to act

with reasonable care and skill in performing his duties as an agent. It is not clear whether the agent who tendered the agreement to the purchaser in fact drafted it, but if he did not draft it himself, he had the duty to at least read it. In our view, the agent was negligent in the drafting of the clause I have quoted and if he did not draft it himself, in failing to draw to the attention of the vendor that the provision mentioned was either ambiguous or contrary to the vendor's listing instructions."

[39] *Paul, supra*, makes it clear that real-estate agents are expected to properly read the contracts they assist their clients in signing and ensure that the service which they are being paid to do, that is to provide professional advice and assistance in the context of a real-estate transaction is done so with a certain degree of diligence and competence.

[40] An Alberta Court of Appeal decision, *McInerny Realty Ltd. v. Academy Aluminum Products Ltd.*, [1980] A.J. No. 660, was a case involving two errors which led to the non-completion of a sale, one due to the innocent misrepresentation of the owner, and the other due to the negligence of the agent. The Court found that it would be impossible to hazard an opinion as to the effect of either error without the other as both existed at the same time. Nevertheless, the agent, and not the seller had held herself out to be skilled in the duties ordinarily carried out by a real estate agent. The property was a valuable one, the commission was of a sizeable value. It would not be appropriate to apportion liability 50% to each, as the real question to be asked in such a situation is whether "the agent has performed the service for which the listing agreement provided payment or was prevented from performing it by the owner's mistake...[in this case] however the owner's mistake is irrelevant. The agent did not perform her duty with the degree of skill, care and diligence required by agreement, and so is not entitled to claim the payment provided by it."

[41] A litany of cases out of Ontario further build on these ideas. *Wong v. 407527 Ontario Ltd.*, [1999] O.J. No. 3377,(ONCA), [*Wong*]; *Blais v. Cook*, [2005] O.J. No. 2643 (ONSCJ); *Wemyss v. Moldenhauer*, [2003] O.J. No. 38 (ONSCJ); *Rankin v. Menzies*, [2002] O.J. No. 51 (ONSCJ) all solidify the high level of knowledge that courts assume agents to have. The Court in *Wong, supra* concluded that because real estate agents are often the only professional advisors to the parties on the terms of an agreement of purchase and sale, they are expected to take an advisory role, and are thus accountable for failing to protect their clients against the special risks of a transaction. These risks include the preparation of documents relevant to the transaction, for which buyers or sellers often pay a large premium of money to an agent to oversee with their specialized knowledge skills.

[42] Justice Shultz in *Hawryluk and Hawryluk v. Korsakoff and Associated Realty Agencies Ltd.*, [1956] M.J. No. 64, said that such documents:

"...are frequently made by and submitted to individuals with little or no knowledge of real estate transactions. Of necessity and with propriety such individuals rely on the professional knowledge and

skill of the real estate agents they employ for their protection when they buy or sell property...[Real-Estate Agents] are given a virtual monopoly of this type of business based on the theory this is the best way of protecting the public interest, the vendor and purchaser are surely entitled to expect that such agents will carry out their duties without the likelihood of either vendor or purchaser having to meet the expenses and uncertainties of a law suit.”

[43] The Canadian Real Estate Association, *REALTOR Code*, Ottawa: CREA, 2008 has set out a code of ethics and responsibilities to govern the conduct of Realtors in Canada. The Realtor Code of Ethics is intended to define the high standard of performance the public has a right to expect from those licensed to display the Realtor trademark. Throughout the *Code*, it is noted how Realtors should be informed of the essential facts of a transaction (Article 1) and should discover those facts pertaining to a property which a prudent Realtor would discover in order to avoid error or misrepresentation (Article 4). A realtor should seek outside professional advice where such advice is beyond the expertise of the Realtor (Article 10), and a realtor shall render a skilled and conscientious service in conformity with standards of competence which are reasonably expected in the specific real estate disciplines in which the Realtor engages (Article 12).

[44] Finally, section 17.2 of the “Exclusive Residential Real Estate Listing Contract” states:

“The Seller’s Agent is obligated to protect and promote your interests. Specifically, the Seller’s Agent owes you the fiduciary duties of loyalty, obedience, confidentiality, reasonable care and skill, full disclosure and full accounting.”

[45] This clause as contained in the contract signed by both the agent and the sellers further elucidates what has already been made readily clear. The Agent has certain duties that the seller does not have, simply because real estate agents hold themselves out to be experts in the field, and thus they are expected to be competent and reasonably skilled in the basic facets of a real-estate transaction. If this were not the case, there would be no point in hiring and paying for their services in the first instance.

Dual Agency

[46] Due to the obvious conflict of interest, the normal rule is that an agent is not allowed to act for both the vendor and the purchaser. This proposition is stated in *Sutton v. Forst* (1924), 55 O.L.R. 281 (CA) at p. 284:

“The fundamental basis of the contract of agency requires the agent to give an exclusive allegiance to his principal and to promote his interests with a singleness of mind.”

[47] However in the context of real estate transactions there is an exception where the agent makes full and timely disclosure of this fact to both of his principals. As stated by *W.F. Foster* in “*Dual Agency: Its Implications for the Real Estate Brokerage Industry*”, *Meredith Memorial Lectures, Current Problems in Real Estate* (1989), at p. 244:

“Whether or not brokers personally profit from the transactions, they will be in breach of their fiduciary duties to their principals unless they can prove: that they did not in fact take advantage of the special relationships with the principals; that the transactions in all respects were fair; that they disclosed fully to the principals their ownership or interest in the properties or transactions; and that the principals had been advised (in some instances at least) to obtain, and given the opportunity to obtain, independent advice regarding the transactions. If these facts can be proved by brokers then, in general, the transactions with their principals will be unobjectionable.”

[48] In *Raso v. Dionigi*, [1993] O.J. No. 67, the real estate agent who was acting for the purchaser and the vendor failed to disclose to the vendor that the purchaser was his sister-in-law. In deciding that the agent was not entitled to his commission, the Ontario Court of Appeal set out some important guidelines (as interpreted by the Court of Queen’s Bench in Alberta in *Torode Realty (Edmonton) Ltd. V. Winfield Power Co.*, 2010 ABQB 625, at para. 34:

- “a. An agent who takes an active role and is seeking a commission from the vendor is not just a middleman. The agent owes a fiduciary duty of disclosure to the vendor.
- b. An agent must disclose everything known to him which would be likely to influence the conduct of his principal.
- c. A fiduciary who breaches his duty by non-disclosure of material facts is not entitled to prove that the transaction would have concluded had disclosure been made.
- d. Where an agent breaches a fiduciary duty to disclose material facts, the agent is precluded from claiming a commission.”

[49] As can be seen, an agent who takes on a dual role in a transaction takes on more responsibilities and obligations than an agent who acts for only one principal. The dual agent must act with the utmost care that he does not favor one principal over the other, either through divulging sensitive information that he should not (ie. the high price a buyer is willing to pay) or through failing to divulge a financial relationship he or she might have with one of the parties. The agent is under an obligation to not just act as the middleman in the transaction, but to actively ensure that he or she fulfills the fiduciary responsibilities expected in the given circumstances.

[50] It would seem to me that one of the easier ways to ensure that a dual agency role does not lead to allegations of bias or conflict between the two parties represented by agents would be to recommend outside legal counsel when signing documents like the Guaranteed Sales Agreement. Doing so would ensure that the best interests of both clients are taken care of, since inherent within the dual agency role is a danger of not being able to single-mindedly represent any one client. Dual agents must always be cognizant of these dangers, and just as is the case in the legal profession, must do their utmost to avoid perceptions of bias. It is a real-estate agents primary duty to always be thinking of the best interests of their client, as this duty goes to the very core of what a agent/principal relationship represents.

[51] In the case of Mr. Broadfoot, the facts show that he failed to inform the Idzan's of the ongoing relationship his company DynaTeam Realty Ltd. had with the purchasing company Fountainhead Financial Inc. This only serves to further bring into question the motivation behind signing a Guaranteed Purchase Agreement in which one of the clauses stated that "Fountainhead may elect not to purchase the Property" (in clause 10). These circumstances at the very least raise a perception of bias potentially suggesting that he was somehow favoring Fountainhead in the contract.

[52] A failure to inform one principal of a business or financial relationship with another principal is a serious oversight which in effect can undermine the ability to properly represent the parties involved. This oversight on the part of Mr. Broadfoot is of a particular serious nature as it brings into question the entirety of his conduct on behalf of the Idzan's and casts a negative light onto the real estate agent profession as a whole. Agency demands an exclusive allegiance to the principal and the exception to act as a dual agent is only permitted when the requirements of full disclosure are strictly adhered to. Mr. Broadfoot chose not to adhere to these principles.

[53] Given the nontechnical nature of the conduct under review and the breadth of authority pertaining to the duties and expectations of a reasonable real estate agent, I find no difficulty in finding what the standard of care was in this situation. Due to his carelessly failing to ensure that there were no ambiguities contained within the Guaranteed Sales Agreement, his oversight in either explaining the anomalies and obvious contradictions between the agreements, his failure to recommend outside legal advice, and the potential for bias in the context of the dual agency role he played, I find that Mr. Broadfoot breached the standard of care required of a real estate agent in such circumstances. Drawing on the reasoning in *Paul, supra*, even if Mr. Broadfoot did not draft the Guaranteed Sales Agreement himself, he had the duty to at least read it. Mr. Broadfoot was negligent in failing to draw to the attention of his clients that the provision mentioned was ambiguous contrary to the listing instructions, and advise the Plaintiffs that the prospective purchaser could for any reason choose to fail to close the transaction.

[54] It is not at all unreasonable to expect a 12 year veteran real-estate agent to be able to ensure that the information disclosed by his clients does not directly conflict with the arrangement he sets up with a 3rd party guaranteed purchaser. In failing to take the necessary precautions in reading the documents for contradictions or errors, and for failing to recommend outside legal counsel to guard against such errors from happening, I find Mr. Broadfoot to have acted negligently in his role as agent for the plaintiffs.

Factual Causation

[55] Would the injury claimed by the plaintiffs have occurred but for the negligent conduct of the defendant? Based on the evidence before me, it can be inferred that the completion of the Guaranteed Sales Agreement was contingent on the existence of an assumable mortgage. This was simply not a possibility from the beginning when this contract was signed. This oversight along with Mr. Broadfoot's failure to properly advise his clients over a period of many months when real estate values were dropping did in my view to a probability that this guaranteed sale was not going to take place. This was of the sale of the Plaintiffs' condominium.

Remoteness

[56] The injury caused to the plaintiff's was directly related to the negligent conduct spoken of and it is entirely reasonable to foresee such damages arising from the negligent conduct. Given the plunging value of real estate, I have on difficulty in determining that the Plaintiff's damages were not too remote.

Damages

[57] There is no dispute that the damages involved exceed the limit set for Provincial Court Civil Actions I would find damages to be \$25,000. The Plaintiffs are therefore entitled to damages against both Mr. Broadfoot and his employer, DynaTeam Realty Ltd. with judgment interested from July 15th, 2008, to today's date. The Plaintiffs are entitled to costs of 5% of the amount sought totalling \$1,250.00 plus disbursements of \$200.00 for filing fees and service costs of \$20.00.

Heard on the 28th day of April, 2011.

Dated at the City of Edmonton, Alberta this 29th day of June, 2011.

J.L. Skitsko
A Judge of the Provincial Court of Alberta

Appearances:

Mr. Robert Russell
for the Plaintiffs

Mr. Darryl Dubrule, of Parker Dubrule
for the Defendants